

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA,	)	CRIM. ACTION NO. 3:04CR00013
	)	
v.	)	
	)	<u>MEMORANDUM OPINION</u>
JOHN COLEMAN REID,	)	
ALAN B. PINKERTON,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the defendants' Objections to the Presentence Report, submitted April 13 and April 19, 2004. The court heard argument concerning these objections during the each of the defendants' sentencing hearings on May 10, 2004. Having heard a full exposition of the pertinent legal and factual issues at the time of the hearings, the court proceeded to overrule each of the defendants' objections. The court writes now to supplement the court's May 10, 2004 ruling to express in fuller detail its reasons for overruling the defendants' objections to the application of a two-point enhancement for abuse of a position of trust.

**I. Background**

The defendants, John Reid and Alan Pinkerton, were each charged in a one-count Information with executing a scheme to commit bank fraud, beginning in May 1998 and continuing through February 2003. Specifically, the defendants were implicated with running a large-scale check kiting scheme involving five financial institutions.<sup>1</sup> During the period of

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<sup>1</sup> In addition to the check kiting operation, Defendant Reid was also personally

the kite, the defendants were entrusted with management positions within a locally owned and managed corporate entity known as Ivy Industries. Defendant Reid served as President of the corporation, while Defendant Pinkerton held the position of Chief Financial Officer. Mr. Reid in fact held a substantial ownership interest in Ivy Industries, along with two others—Francis Parker and Corwith Davis. During the course of their management of Ivy Industries, the corporation encountered various financial difficulties. In order to manage these difficulties, the defendants began to write checks on one business account to cover insufficient funds of another business account. The defendants carried on this practice, ultimately juggling multiple accounts within the kite, for well over three years. The total amount of loss to the financial institutions involved was over 2.4 million dollars.

On February 11, 2004, each defendant pled guilty to the Information pursuant to a written plea agreement. Following the completion of a presentence investigation report revealing the details of the defendants' activities, the defendants each filed, similar in all material respects, an objection to the application of a two-point upward adjustment to the offense level for the abuse of a position of trust pursuant to Section 3B1.3 of the Sentencing Guidelines.

## **II.. Discussion**

Section 3B1.3 of the Sentencing Guidelines provides that “[i]f the defendant abused a

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responsible for fraudulently obtaining several large loans. Defendant Pinkerton is not implicated in these activities.

position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission of the offense,” the offense level is to be increased by two levels.

U.S.S.G. § 3B1.3 (2002). The commentary to the Sentencing Guidelines further explains that

“[p]ublic or private trust” refers to a position of public or private trust characterized by professional or managerial discretion. . . . For this adjustment to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense. . . . This adjustment, for example, applies in the case of an embezzlement of a client’s funds by an attorney as a guardian, a bank executive’s fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.

U.S.S.G. § 3B1.3 comment. (n.1).

In this case, the central issue concerning the application of the abuse of trust enhancement depends on the preliminary element—whether the defendant can be fairly classified as having occupied a position of trust. The Fourth Circuit has held that “the ‘position of trust’ inquiry must focus on the relationship between the defendant and the victim from the perspective of the victim.” *United States v. Caplinger*, 339 F.3d 226, 236 (4th Cir. 2003). “There must be a trust relationship between [the defendant] and his victim for the enhancement to apply.” *United States v. Moore*, 29 F.3d 175, 180 (4th Cir. 1994). “A sentencing court must carefully distinguish between those arms-length commercial relationships where trust is created by the defendant’s personality or the victim’s credulity, and those where a fiduciary

or personal trust relationship exists with the victim, and the defendant takes advantage of the relationship to perpetuate or conceal the offense. Only the latter circumstances justify the enhancement.” *Caplinger*, 339 F.3d at 237 (internal quotation marks and citations omitted).

Thus, while in every case of fraud the defendant will have gained the trust and confidence of the victim, “fraud alone does not justify the enhancement.” *United States v. Bollin*, 264 F.3d 391, 415 (4th Cir. 2001). In determining when there exists such a trust relationship that the enhancement applies, the Court of Appeals has directed that several factors be taken into consideration

First, courts ask whether a defendant had special duties or special access to information not available to their employees. Second, the defendant’s level of supervision or managerial discretion is relevant. . . . Third, the analysis also entails an examination of the acts committed to determine whether this defendant is more culpable than others who hold similar positions and may commit crimes.

*United States v. Gordon*, 61 F.3d 263, 269 (4th Cir. 1995) (internal quotation marks and citations omitted).

Having considered the aforementioned factors and having applied them from the perspective of the victims in this case, the court concluded that the abuse of a position of trust enhancement should apply.

First, the court notes that there are essentially two categories of victims in this case. On the one hand, the several banks defrauded by the defendants are primary and direct victims

of the check kiting scheme perpetuated by the defendants. On the other hand, the secondary victims of the offense include the co-owners of Ivy Industries—Corwith Davis and Francis Parker—as well as the many employees and other shareholders of the corporation. While both sets of victims undoubtedly extended a substantial degree of trust and confidence in the defendants, it is in relation to this secondary group that the defendants, as officers of the corporation, held a special position of trust within the meaning of the Sentencing Guidelines. Nothing in the application of the Guideline provisions specifies that a sentencing court should not consider the relationship of a defendant to any secondarily injured victims. Indeed, such application has been recognized within this judicial circuit as well as a few others. *See United States v. Beck*, 324 F.3d 786, 794-95 (5th Cir. 2003) (holding that an enhancement is warranted whenever any victim of a criminal scheme placed the defendant in a position of trust that significantly facilitated the crime); *United States v. Cusack*, 229 F.3d 344, 349 (2d Cir. 2000) (holding that “the victim whose trust the defendant abused need not have been the primary victim,” rather “[t]he definition of victim depends upon the circumstances of the case.”); *United States v. Akinoye*, 185 F.3d 192, 204 (4th Cir. 1999) (applying enhancement to secondary victims who, although they did not suffer the ultimate financial burden, bore emotional, financial and other burdens as a result of the defendant’s crime); *United States v. Bhagvan*, 116 F.3d 189, 193 (7th Cir. 1997) (finding enhancement to apply so long as identifiable victims placed the defendant in a position of trust and that trust contributed in a significant way to the commission or concealment of the offense). Accordingly, the court has assessed the application of the two-point sentencing enhancement from the perspective of the

secondary victims.

Second, and with this perspective in mind, the court finds that consideration of the facts of this case in light of the several factors to be taken into account in reviewing the propriety of an abuse of position of trust enhancement weigh in favor of its application. Certainly each of the defendants in this case had special duties as President and Chief Financial Officer of the corporation. These duties provided special access to and control of the checking accounts employed in this scheme. Furthermore, there is no question that these defendants held such high positions within the corporate structure that they were subject to virtually no supervision by others and held positions of substantial discretion and authority. Finally, and most importantly, the nature and extent of the crime support the court's conclusion that the defendants are more culpable than other corporate officers who may commit crimes. The check kiting scheme was perpetuated by the defendants for almost three years, a period of time which suggests that the defendants affirmatively chose to continue the fraud. Indeed, the defendants met on a regular basis to review the status of the kite and to draft additional checks necessary to keep the kite going. Their activities resulted in a total loss to the victims of the kite of well over two million dollars, an amount that places this particular crime in a range of financial loss rarely seen within this judicial district. It is this court's view that a crime of this magnitude and scope could not have been accomplished without detection for such a significant period of time in the absence of the obviously great degree of trust extended to the defendants in this case. The court consequently could not avoid the conclusion that the elements necessary for the sentencing enhancement for abuse of a position of trust must be

applied.

### **III. Conclusion**

It is for the foregoing reasons, along with those articulated by the court from the bench in the May 10, 2004 sentencing hearing, that the court determined that Defendants Reid and Pinkerton should receive a two-point sentencing enhancement for abuse of a position of trust pursuant to the requirements of Section 3B1.3 of the Sentencing Guidelines.

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion to all counsel of record.

ENTERED:

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Senior United States District Judge

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Date